Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; and RASIER, LLC,<br><br>Plaintiffs,<br><br>vs.<br><br>THE CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and CALVIN W GOINGS, in his official capacity as Director, Finance and Administrative Services, City of Seattle,<br><br>Defendants. | No. 17-cv-00370-RSL<br><br>**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT**<br><br>**NOTED ON CALENDAR: April 26, 2019** |



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## I. The Labor Exemption Can Apply to Independent Contractors.

In opposing Seattle's request to conduct limited discovery before responding to the Chamber's motion for summary judgment, the Chamber asks this Court to rule as a matter of law that the labor exemption to federal antitrust law can never apply to individuals who are "independent contractors" rather than "employees" or "servants" under the common law. But the Chamber cannot cite a single precedent adopting this narrow rule. That is not surprising, because the very purpose of the Norris-LaGuardia Act—one of two statutes that form the basis for the labor exemption—was "to overrule judicial decisions that had unduly restricted the … labor exemption from the antitrust laws." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoreman's Ass'n*, 457 U.S. 702, 712 (1982). This Court should reject the Chamber's unduly narrow interpretation of the exemption.

### A. The Text of the Clayton and Norris-LaGuardia Acts Does Not Distinguish Between Workers on the Basis of Common Law Standards.

The Chamber initially contends that the language of the Clayton and Norris-LaGuardia Acts demonstrates that the labor exemption does not apply to individuals with the common law status of independent contractor. Chamber Resp. at 2-3. But the Chamber ignores the Clayton Act's core statutory language that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. §17. That language focuses solely on whether the "market" at issue involves human labor rather than a good, commodity, or service, without distinguishing between common law servants/employees and independent contractors. *See Hunt v. Crumboch*, 325 U.S. 821, 824 (1945).

None of the other statutory provisions the Chamber cites distinguishes between common law employees and independent contractors. The Clayton Act's statement that "labor, agricultural, or horticultural organizations" cannot be deemed "illegal combinations or conspiracies in restraint of trade, under the antitrust laws," 15 U.S.C. §17, and the Norris-LaGuardia Act's prohibition on injunctions "involving or growing out of a labor dispute," 29 U.S.C. §101, both reference "labor," not common law employees. Norris-LaGuardia defines a labor dispute as "any controversy concerning terms or conditions of employment," 29 U.S.C. §113(c), but when that law was enacted the term "employment" encompassed work by independent contractors as well as common law employees.



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*New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 540 (2019) ("All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.").

The Chamber contends that *Jacksonville Bulk Terminals* limited the Norris-LaGuardia Act's prohibition on injunctions to disputes involving common law employees, Chamber Resp. at 3, but *Jacksonville Bulk Terminals* emphasized the breadth of the prohibition and rejected the narrow construction proposed by the employer in that case, concluding that Norris-LaGuardia applied to a strike motivated by politics instead of economic self-interest. 457 U.S. at 704, 711-12. The Court stated that the "employer-employee relationship" must be the "matrix" of a controversy for it to be covered by Norris-LaGuardia, but nowhere suggested that the existence of such a relationship turns upon common law standards. To the contrary, the Court explained that it has consistently "refused to give the Act narrow interpretations that would have restored many labor dispute controversies to the courts," and concluded that a labor dispute existed because the conflict involved a "labor group" in a dispute regarding its members' "obligation to provide labor." *Id.* at 712, 714 (quotation omitted).[1]

The Chamber also relies upon the Clayton Act's prohibition on injunctions in cases "between employers and employees." 29 U.S.C. §52. But the courts' narrow interpretation of that provision was precisely what prompted Congress to enact Norris-LaGuardia, which clarified that the prohibition on labor injunctions applies "regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113(c). The Chamber insists that this language should be construed narrowly, Chamber Resp. at 4, but both Congress and the Supreme Court have rejected that approach. *Jacksonville Bulk Terminals*, 457 U.S. at 712 (Norris-LaGuardia's language "must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws"). Under Norris-LaGuardia, laborers' ability to engage in collective activity without facing the threat of federal antitrust

[1] In *Jacksonville Bulk Terminals*, *H.A. Artists & Assocs., Inc. v. Actors' Equity As'sn*, 451 U.S. 704 (1981), and *Burlington Northern Santa Fe Ry. Co. v. Teamsters Local 174*, 203 F.3d 703 (9th Cir. 2000), there was no dispute that the workers at issue were common law employees, and thus no need for the Court to consider whether the labor exemption can apply to individuals with the common law status of independent contractor. *See Jacksonville Bulk Terminals*, 457 U.S. at 713; *H.A. Artists*, 451 U.S. at 717 n.20; *Burlington Northern*, 203 F.3d at 705.



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liability does not turn upon such fine-grained distinctions.[2]

**B. The "Employees" Covered by Pre-1947 Labor Relations Statutes Included Independent Contractors.**

The Chamber's legal arguments are premised on the assumption that the Clayton Act's reference to "employees" and the Supreme Court's references to "employer-employee relationships" covered by the Clayton Act and Norris-LaGuardia are limited to relationships that would be characterized as master-servant relationships at common law. But that "precarious premise" is historically incorrect, as the Supreme Court recently recognized. *New Prime*, 139 S.Ct. at 542-43.

When the Clayton and Norris-LaGuardia Acts were enacted, "employee" was not used to refer exclusively to individuals with common law "servant" status, and was often used as a synonym for "worker." *See, e.g.*, *Prince v. Schwartz*, 180 N.Y.S. 703, 704 (App. Div. 1920) ("[I]t must be held that the employé was an independent contractor."); Black's Law Dictionary 951 (3d ed. 1933) ("If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor."). This was particularly true in federal labor relations statutes. The Railroad Labor Board "interpreted the word 'employee' in the Transportation Act of 1920 to refer to anyone 'engaged in the customary work directly contributory to the operation of the railroads,'" including both common law employees and independent contractors. *New Prime*, 139 S.Ct. at 543 (citing Transportation Act of 1920, §§304, 307, 41 Stat. 456; *Ry. Employees' Dep't v. Indiana Harbor Belt R.R. Co.*, No. 982, 3 R.L.B. 332, 337 (1922)); *see also United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700, 702 (1922) (same). "[T]he Erdman Act, a statute enacted to address disruptive railroad strikes at the end of the 19th century, seems to evince an equally broad understanding of 'railroad employees,'" defining those "employees" to include "'all persons actually engaged in any capacity in train operation

[2] In many instances, whether a particular group of workers are properly classified as employees or independent contractors under the common law will be a subject of dispute. *See, e.g*, Dkt. #52, at 21 (noting "the NLRB's long consideration" of whether certain Ordinance-covered drivers "fall within the NLRA's definition of 'employee'"). Under the Chamber's approach, workers could face federal criminal prosecutions for incorrectly concluding that they were common law employees entitled to engage in collective activity under the labor exemption. *See, e.g.*, *United States v. A. Lanoy Alston*, 974 F.2d 1206, 1214 (9th Cir. 1992) (federal criminal prosecution of dentists who had lobbied prepaid dental plans to increase fees they paid for dentists' services).



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or train service of any description.'" *New Prime*, 139 S.Ct. at 543 & n.12 (citing Act of June 1, 1898, ch. 370, 30 Stat. 424); *see also* Newlands Act, ch. 6, 38 Stat. 103, 104 (1913) (same).[3] *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944), interpreted the NLRA in a similar manner.

To be certain, 1947's Taft-Hartley Act subsequently limited the NLRA's coverage to individuals who would be classified as employees at common law. 29 U.S.C. §152(3). But that statutory change to the NLRA—which did *not* amend the Clayton or Norris-LaGuardia provisions on which the labor exemption is based—did not change the fact that the term "employee" was not limited to common law servants when Congress enacted the Clayton and Norris-LaGuardia Acts.

The Chamber argues that *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), "overruled *Hearst*'s reasoning" and requires this Court to construe the term "employee" as limited to common law servants. Chamber Resp. at 5-6. But *Darden* considered the later Employee Retirement Income Security Act of 1974, not the Clayton or Norris-LaGuardia Acts or any other pre-Taft-Hartley legislation. While acknowledging that *Hearst* was correctly decided, *Darden* held that the congressional response to *Hearst* and to a similar ruling in *United States v. Silk*, 331 U.S. 704, 713-14 (1947), justified presuming that Congress incorporated the common law distinction between servants and independent contractors into post-Taft-Hartley employment legislation. 503 U.S. at 324-25. As *New Prime* demonstrates, that presumption is inapplicable to *pre*-Taft-Hartley statutes.

**C. The Chamber's Authorities Involved Independent Entrepreneurs.**

Finally, the Chamber suggests that prior decisions denying the labor exemption to independent entrepreneurs like fisherman and physicians were decided solely on the basis of the entrepreneurs' status as common law independent contractors. Chamber Resp. at 7. But each of the cited Supreme Court decisions was careful to note the features of the entrepreneurs' business practices that distinguished them from laborers. *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143,

[3] As its extended discussion of the Transportation Act of 1920 and the Erdman Act makes clear, *New Prime* in no way suggested that the use of the term "employee" in early 20th century labor relations statutes was necessarily limited to common law servants, as the Chamber incorrectly contends. *See* Chamber Resp. at 6-7. The portions of *New Prime* cited by the Chamber simply acknowledge that the term "worker" indisputably includes both common law servants and independent contractors while "employee" is more ambiguous, and that the term "employee" both lacked the "historical baggage" of "servant" *and as a separate matter* proved useful because it "fully encompassed the broad protections [legislators] sought to provide" through worker-protective legislation. 139 S.Ct. at 541, 542 n.7.



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144-45, 147 (1942) (fishermen "own or lease fishing boats," "carry on their business as independent entrepreneurs," exercise "extensive" control over supply of commodity, and in some instances "have a small number of employees of their own"); *L.A. Meat & Provision Drivers Union Local 626 v. United States*, 371 U.S. 94, 96, 102 (1962) ("grease peddlers" were "independent entrepreneurs whose earnings as middlemen consisted of the difference between the price at which they bought the restaurant grease from various sources and the price at which they sold it to the processors"; like *Columbia River* fishermen, they "were sellers of commodities"); *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463-64 (1949) (noting contractor's significant "rentals, capital costs, overhead and profits" and stating contractor "is an entrepreneur, not a laborer"); *Am. Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943) (physicians were "individual practitioners each exercising his calling as an independent unit" who believed "that they and all others should practice independently on a fee for service basis where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment"). If defendants' undisputed independent contractor status were dispositive, the discussions of these other aspects of their business practices would have been unnecessary.[4]

**II. *Per Se* Rules May Not Apply To Coordinated Driver Conduct.**

As Seattle has explained, the Supreme Court applies "the flexible Rule of Reason" instead of *per se* rules to restraints on competition that "are essential if the product is to be available at all." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)); *see also BMI v. CBS*, 441 U.S. 1 (1979). The Chamber does not dispute that the "driver coordinators" the Ordinance regulates enable the kind of price-fixing by drivers that would be per se unlawful unless such an exception applies. It contends, however, that this exception extends only to fixing consumer prices, not to drivers' interactions with driver coordinators. But the Chamber's argument depends upon a factual contention that has not yet been subjected to discovery—

[4] *Conley Motor Express, Inc. v. Russell*, 500 F.2d 124 (3d Cir. 1974), and *Spence v. Southeastern Alaska Pilots' Ass'n*, 789 F.Supp. 1007 (D. Alaska 1990), likewise involved individuals who had made substantial investments in training or specialized capital that are likely to distinguish them from the drivers covered by the Ordinance, who have no specialized training and use their own general-purpose automobiles to transport passengers.



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namely, that the coordinated driver conduct essential to the driver coordinators' products is limited to fixing consumer prices and does not depend on other forms of coordination.

Moreover, a restraint on competition "need not itself be essential" for the exception to *per se* rules recognized in *American Needle*, *NCAA*, and *BMI* to apply. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). Instead, it must simply be "reasonably ancillary to the legitimate cooperative aspects of the venture." *Id.* In *NCAA*, the Supreme Court applied the Rule of Reason to the NCAA's fixing of the price to televise college football games and its restriction of the number of televised games, even though neither was "essential" to intercollegiate athletic competition. 468 U.S. at 100-03. That the NCAA's member institutions legitimately cooperated in staging athletic competitions made *per se* rules inapplicable, even with respect to conduct in the distinct market for televising football games. Discovery is necessary here to determine, as a factual matter, whether permitting drivers to engage in collective negotiations regarding matters such as safety standards and background checks is reasonably ancillary to other legitimate forms of coordinated driver conduct, such as their agreement to provide rides dispatched by an application pursuant to uniform driver coordinator policies and pricing formulas.[5]

The Chamber contends that the Ninth Circuit's decision on appeal requires this Court to distinguish the relationship between driver coordinators and their drivers from the drivers' provision of transportation to the public. Chamber Resp. at 11. But the Ninth Circuit drew that distinction only in concluding, for state action immunity purposes, that the Washington state laws authorizing the Ordinance lacked sufficiently clear language permitting drivers to fix prices for ride referrals. *Chamber of Commerce v. Seattle*, 890 F.3d 769, 784-85 (9th Cir. 2018). The Court instructed the parties to "address on remand which mode of antitrust analysis—the per se rule of illegality or the rule of reason—applies," without narrowing that inquiry. *Id.* at 781.

This Court should therefore grant Seattle leave to undertake discovery on both issues.

[5] The Chamber contends that Seattle's interpretation of *BMI* "would shield from *per se* scrutiny musicians who fix prices for their business purchases, such as buying pianos or studio time." Chamber Resp. at 10. But the more apt analogy is whether the exception recognized in *BMI* is limited to the blanket license, or would also extend to group lobbying of BMI by the artists who license their songs for inclusion in its blanket license.



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DATED this 25th day of April, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of April, 2019, I electronically filed this DEFENDANTS' REPLY IN SUPPORT OF MOTION TO PERMIT DISCOVERY NECESSARY TO OPPOSE SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed:

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